

MEDIATION BEST PRACTICES: How Standards of Practice Protect Participants and Enhance Mediation



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Mediation – The View From 30,000 Ft.

- Definition: an informal, voluntary process in which a neutral third person, the mediator, helps disputing parties to reach agreement. The mediator has no power to impose a decision on the parties.
- Facilitative mediation: the mediator facilitates discussion and helps guide parties to agreement; does not render opinions on the merits of their dispute or tell the parties what they should do.



Pre-Mediation Actions

- Intake:

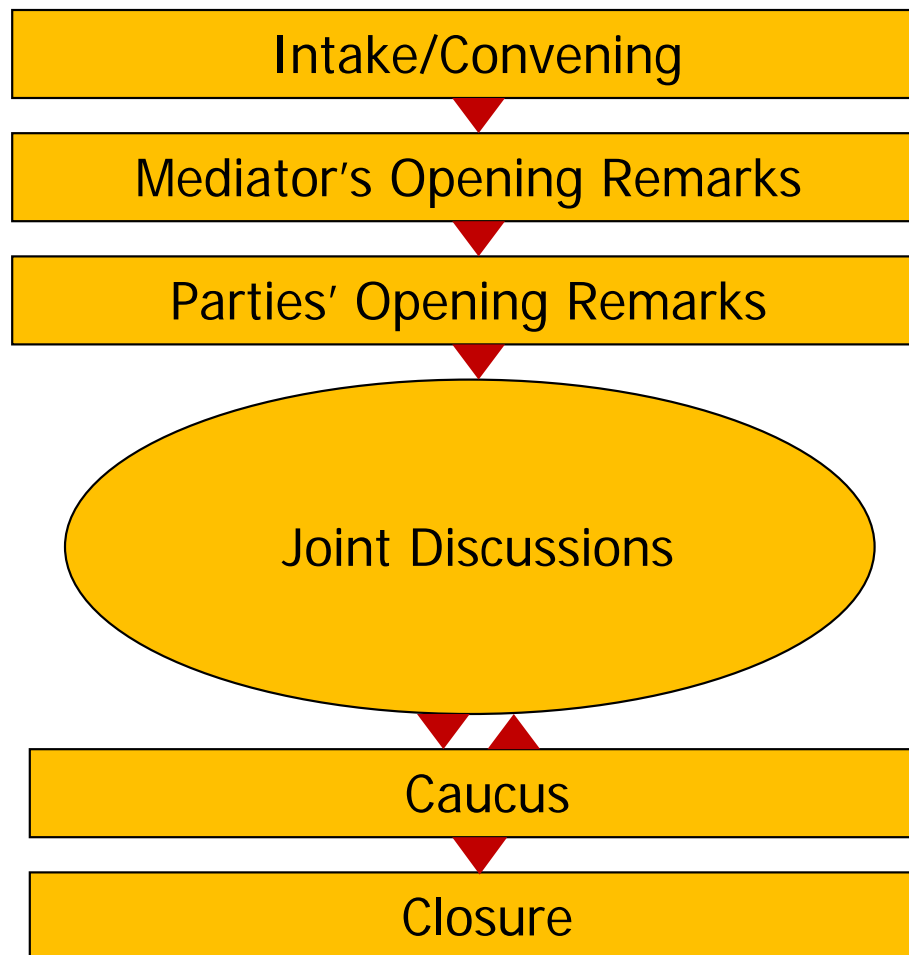
- Obtain information about the dispute and identify parties
- Determine whether dispute is right for mediation
- Discuss mediation process with the parties – *Establish Expectations and Ensure Informed Choice!*
 - How does the process work?
 - What is the mediator's role and purpose?
 - What are the parties' roles?
 - What options are available if mediation is unsuccessful?

- Convening:

- Offer of mediation and acceptance/rejection
- If accepted, obtain consent to mediate (both parties)
- Acquire mediator; set up date, time and location
- Mediator assumes control and conducts mediation session(s)



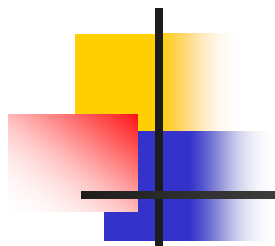
Typical Mediation Procedure





Model Standards of Conduct

- Model Standards of Conduct for Mediators, 2005 (Joint issuance of American Bar Association, American Arbitration Association, and Association for Conflict Resolution)
- Guide for Federal Employee Mediators (Issued May 2006 by Interagency ADR Working Group Steering Committee)
 - Supplements ABA/AAA/ACR Model Standards
 - Total of 9 standards, but 5 get the most attention



Model Standards of Conduct

1. Self-Determination*
2. Impartiality*
3. Conflicts of Interest*
4. Competence
5. Confidentiality*
6. Quality of the Process*
7. Advertising and Solicitation
8. Fees and Other Charges
9. Advancement of Mediation Practice



Why Have Standards?

- Guide the conduct of mediators
- Inform the mediating parties
- Promote public confidence in mediation
- Bottom Line: Standards of Conduct are intended to protect the parties and the public



Standard 1: Self-Determination

- Mediator ensures self-determination of parties.
- Self-determination: act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome. Parties may exercise self-determination at any stage.
 - Mediator
 - Process
 - Voluntary
 - Outcomes
- Mediator may not undermine self-determination for any reason—money, settlement rates, egos, or outside pressure.



Standard 2: Impartiality

- Mediator must maintain impartiality (defined as freedom from favoritism, bias and prejudice)
- Avoid conduct that gives appearance of partiality.
- Where mediator is unable to conduct mediation in an impartial manner, he or she must withdraw.



Standard 3: Conflicts of Interest

- Mediator shall avoid conflicts of interest or appearance of a conflict of interest.
 - Involvement in the dispute or relationship with a party that could raise question of partiality
- Reasonable inquiry to determine any facts that would suggest existence of a conflict.
- Continuing duty to disclose – parties decide
- Conflicts that undermine quality of the process require withdrawal in all cases
- Avoid post-mediation conflicts



Standard 5: Confidentiality

- Mediator shall maintain the confidentiality of all information obtained by the mediator in mediation, unless otherwise agreed to by the parties or required by applicable law.
- Mediator may not convey any information that was obtained during private caucus without the consent of the disclosing person.
- Parties can vary the terms of confidentiality.
- Additional statutory rules for federal mediators.



Standard 6: Quality of the Process

- Mediator shall conduct mediation according to the Model Standards and in a manner that promotes diligence, timeliness, safety, presence of the appropriate participants, party participation, procedural fairness, party competency and mutual respect among all participants.
- Domestic abuse/violence: mediator must take appropriate steps.
- Participant conduct jeopardizing proceedings: mediator must take appropriate steps.
- Many subparts to this Standard.



Vignettes

- Brief skits depicting parts of the mediation process
- Interactive discussion with audience:
 - What if any problem(s) did you notice?
 - What standard(s), if any, are involved?
 - What's the impact on the parties?
 - What, if anything, should be done, and by whom?
- Have fun!



Takeaways

- What happens *before* mediation is as important as what happens *during*.
- Consider problem-solving goals, not just merits of the dispute.
- Standards of Conduct bind the mediator to protect the parties and the public.
- A well-conducted mediation inspires confidence in the process, regardless of outcome.